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No. 87-588

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PEABODY COAL COMPANY,
Appellant,

vs.

THE STATE TAX COMMISSION OF MISSOURI, CHARLES SCHNEIDER, and GEORGE LEACHMAN,
Appellees.

On Appeal From the Supreme Court of Missouri

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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I. SUPREME COURT JURISDICTION TO HEAR APPEAL

A. Appellate Jurisdiction Under 28 U.S.C. § 1257(2) — Obligatory Jurisdiction

The Court has appellate jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1257(2). The appeal "draw[s] in question the validity of a [Missouri] statute . . . on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the [Missouri Supreme Court] decision is in favor of its validity." 28 U.S.C. § 1257(2). At all levels below, Peabody explicitly challenged the taxation of its aircraft under Mo. Rev. Stat. §§ 137.075 and 137.095 on a non-apportioned basis, as in

violation of the Due Process Clause of the United States Constitution. The Missouri Supreme Court enforced §§ 137.075 and 137.095 as taxing the full value of Peabody's aircraft on an unapportioned basis, against Peabody's insistence that if so applied, the statutes were void under the United States Constitution. The Missouri Supreme Court ruling necessarily affirmed the validity of the statute as applied, and therefore, its judgment is appealable to this Court under 28 U.S.C. 1257(2). *See e.g., Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 440-41 (1979); *American Oil Co. v. Neill,* 380 U.S. 451, 455 (1965); *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 686 (1965); *Fiske v. Kansas,* 274 U.S. 380, 385 (1927); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 288-89 (1927).

Appellee's assertion that the decision below was based upon the resolution of questions of fact is incorrect. No facts were "resolved" by any of the administrative agencies or courts below. The case was submitted at all levels below upon a Joint Stipulation of Facts. This appeal presents the purely legal question of the standard to be applied in determining whether corporate aircraft acquire a tax situs in a non-domiciliary state so as to be subject to ad valorem taxation. Peabody has explicitly challenged the validity of §§ 137.075 and 137.095 as applied to the taxation of its aircraft on a non-apportioned basis. The Court's appellate jurisdiction to hear this appeal, therefore, rests upon 28 U.S.C. § 1257(2).

B. Alternative Appellate Jurisdiction Under 28 U.S.C. § 1257(3) — Discretionary Jurisdiction

In the event this Court determines that Peabody's appeal is improvident under § 1257(2), Peabody requests the Court to treat its Jurisdictional Statement as a Petition for a Writ of Certiorari and to review its appeal under § 1257(3).

Title 28, United States Code § 2103 provides that an improvidently taken appeal shall not be grounds for dismissal in a

case where the proper mode of review is by Petition for a Writ of Certiorari. 28 U.S.C. § 2103 (1986). The Court should treat the Jurisdictional Statement as a Petition for a Writ of Certiorari and act accordingly. *See Addington v. Texas*, 441 U.S. 418, 422-23 (1979). This Court should note probable jurisdiction, or in the alternative, grant certiorari and review the issue presented on the merits.

II. CASE OR CONTROVERSY

A. Ripeness

The Appellees' assertion that the constitutional issues in this case are not ripe for adjudication is wholly without merit. Peabody has been injured by the unconstitutional taxation of its aircraft on an unapportioned basis.

Missouri may impose a constitutional personal property tax on Peabody's aircraft without apportionment *only* if the property has not acquired a tax situs in another state. *Central Railroad Co. v. Pennsylvania*, 370 U.S. 607 (1962). This Court has never required a showing that personal property taxes are *actually* imposed on the property in another state to challenge the collection of a tax that should be apportioned. For example, in *Central Railroad*, the Court said:

> Since the domicilary State is precluded from imposing an ad valorum tax on any property to the extent that it *could* be taxed by another State, not merely on such property as *is* subject to tax elsewhere, the validity of Pennsylvania's tax must be determined by considering whether the facts in the record disclose a possible tax situs in some other jurisdiction.

Id. at 614 (emphasis in original). Even the court below rejected Appellees' contention, stating that "it makes no difference whether any other state has tried to subject the aircraft to ad valorum taxation . . . . The existence in another state of the constitutional authority to do so is enough to preclude Missouri from levying the unapportioned ad valorum tax." *Peabody*

Coal Co. v. State Tax Comm'n, 731 S.W.2d 837, 838 (Mo. banc 1987); App. A. to Jurisdictional Statement at A-3.

B. Standing

For the same reason, Appellees' argument that Peabody lacks standing to appeal because it has not suffered any injury in fact is frivolous. Peabody has paid a tax under Mo. Rev. Stat. §§ 137.075 and 137.095 which it claims is unconstitutional because the property has acquired a tax situs in Indiana, as well as Missouri, and therefore, is required by the Due Process Clause to be apportioned. It makes no difference whether Indiana has tried to subject the aircraft to ad valorum taxation. An unapportioned personal property tax is unconstitutional whenever another state *could possibly* assert jurisdiction to tax. *Central Railroad,* 370 U.S. at 614.

Accordingly, Peabody has suffered an injury in fact and has standing to bring this appeal.

III. SUBSTANTIALITY OF QUESTION PRESENTED

The substantial federal question presented by this appeal is whether business aircraft used as instrumentalities of interstate commerce should be subject to the same requirement of apportionment for personal property taxation as commercial aircraft owned and operated by regularly scheduled common carriers. Appellees argue that there is no uncertainty for interstate businesses who operate their own private aircraft. However, businesses that desire to obtain and operate or continue to operate their own aircraft are placed in an unreasonable position of having to establish a fixed daily schedule or subject themselves to the risk of inconsistent or multiple taxation. This uncertainty presents a significant obstacle to businesses that are attempting to decrease their reliance on inconvenient and unreliable commercial airlines.

Moreover, Appellees' assertion that private corporate aircraft are always "taxed, if at all, by the domiciliary state" is simply

untrue. Appellees' Brief at 6. For example, in a decision handed down after this case, the Missouri Supreme Court held that Missouri could levy a use tax on private corporate aircraft as a non-domiciliary state based upon the aircraft having made five landings in the state during the taxable period and having spent less than 7% of its ground time in Missouri. *Director of Revenue v. Superior Aircraft Leasing Co., Inc.*, 734 S.W.2d 504, 507, 508 n. 1 (Mo. banc 1987). These apparently contradictory decisions by the same court have created substantial uncertainty because it now appears that making five landings in Missouri is sufficient to create a tax situs in that non-domiciliary state, but making 225 landings in Indiana is insufficient to create a tax situs in that non-domiciliary state. Clearly, the situation demands guidance from this Court to give coherence and consistency to the rules applicable to aircraft operated in interstate commerce by businesses which are not common carriers.

Contrary to Appellees' assertion, this Court's ruling in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954), clearly limits the application of *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944). While the *Braniff* court did not expressly overrule *Northwest*, it interpreted the holding of *Northwest* to be merely that the taxpayer failed to prove a tax situs in a non-domiciliary state. *Id.* at 602. In *Braniff*, on the other hand, the Court addressed the proof necessary to show that a non-domiciliary forum could tax aircraft employed in interstate commerce. It held that aircraft were "habitually employed" within the non-domiciliary state because of proof of the number and proportion of landings in the state to all landings of the fleet. *Braniff*, 347 U.S. at 600-601. The application of the *Braniff* standard to the taxation of aircraft operated in interstate commerce by a business which is not a common carrier, however, is the issue that has yet to be determined by this Court.

Braniff nowhere purports to be restricted to common carriers or to operators of aircraft on fixed, regular routes. The basis

upon which the *Braniff* court held that a non-domiciliary state could tax certain aircraft was their contacts with the state as evidenced by the number and proportion of landings in the non-domiciliary state compared to their total landings in all states. *Braniff,* 347 U.S. at 600-601. There was no requirement that an aircraft be operated by a regularly scheduled common carrier or be operated by a carrier who rents ground space, picks up or delivers cargo or passengers for hire, has its planes maintained or otherwise serviced, or earns revenue directy from the operation of the aircraft in the state. *Braniff* held that due process is satisfied if the aircraft are habitually employed within the state as evidenced by the *number and proportion of landings in the state. Id.*

There is no logical reason for applying a different standard to the taxation of aircraft operated by a business which is not a common carrier than to aircraft operated by a common carrier. All of this Court's opinions on the apportionment of taxes turn upon the nature and extent of the property's contacts with the non-domiciliary state — not upon the nature and character of the taxpayer who owns the property. Accordingly, any aircraft operating in interstate commerce acquires a non-domiciliary tax situs "if their operations entail something more than sporadic and casual entries into the state." *See Developments in the Law — Federal Limitations on State Taxation of Interstate Business,* 75 Harv. L. Rev. 953, 984 (1962).

CONCLUSION

For the foregoing reasons, Appellant Peabody Coal Company respectfully requests the Court to deny Appellees' Motion to Dismiss or Affirm and to note probable jurisdiction of this appeal.

Respectfully submitted,

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